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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 375

HAROLD A. SWANSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CLAUDE L. DAWSON
810-18th St., N. W., S. 307
Washington 6, D. C.

DONALD M. MURTHA
1009 Tower Building
Washington 5, D. C.

Attorneys for the Petitioners.

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The petitioner, Harold A. Swanson, by his counsel of record, prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered in the above-entitled case on May 18, 1964. (R. 81)

JURISDICTION

The judgment of the United States Court of Claims was entered on May 18, 1964, page 1A of the Appendix and page 81 of the Record. This petition is filed within ninety days from the date of the judgment. Jur-

isdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

QUESTIONS INVOLVED

(1) Whether a veteran preference eligible with a permanent status employed by the United States may be dismissed from governmental service without compliance with Sections 12 and 14 of the Veterans Preference Act of June 27, 1944 (5 USC 861 and 863) when he was, in fact, transferred from his position and grade with the International Cooperation Administration and without a break in his employment status was employed by the Agency for International Development.

(2) Where the petition filed by the petitioner in the United States Court of Claims alleged that the petitioner was transferred from his job position in the International Cooperation Administration to the Agency for International Development, can the Court below, without a hearing of the facts of the case, sustain a motion for a summary judgment made by the Respondent?

(3) Where the petitioner was employed in the International Cooperation Administration, which was abolished on November 3, 1961, and without a break in his service was given a temporary appointment, effective November 4, 1961, with the Agency for International Development, are these facts sufficient to show that the petitioner was in fact transferred to the Agency for International Development?

(4) Where petitioner, a permanent civil service employee with veteran's preference and a permanent civil service status as an employee of the International Cooperation Administration which was abolished on November 3, 1961, was given without break in service a temporary appointment on November 4, 1961 with the Agency for International Development, was this appointment a mere

subterfuge to deprive the petitioner of his rights as a veteran's preference eligible and a permanent civil service employee of the United States?

STATEMENT OF THE FACTS

The petition filed in this case in the United States Court of Claims alleged among other things that your petitioner at all of the times mentioned in the said petition was a permanent civil service employee of the United States with veteran's preference. That he was employed in the capacity of an Industrial Advisor in the International Cooperation Administration with a grade of FSR-1150-3 at a salary of $11,310.00 per annum. That the International Cooperation Administration was abolished by Section 621 (d) of the Foreign Assistance Act of 1961, enacted by the 78th Congress. That immediately upon abolishment of the International Cooperation Administration Congress created in its place an agency known as the Agency for International Development.

The petitioner alleged in his petition that without a break in his services as an employee of the United States, upon the creation of the Agency of International Development, which took over the duties and responsibilities of the International Cooperation Administration, the petitioner was transferred on November 4, 1961 as a government employee to the Agency for International Development and was employed in his salary in grade of FSR-1150-3 at an annual salary of $14,310.00 per annum, and that he continued in such employment until January 15, 1962, when without just cause or provocation his active services were terminated, although he was kept on leave without pay until Deeember 15, 1962.

Section 621 (d) of the Foreign Assistance Act of 1961 provided in part as follows:

"On the date of the abolition of the International Cooperation Administration the President shall transfer to an officer or head of an agency of the United States Government carrying out functions under part I such offices, entities, functions, property, records, and funds of such agency, not otherwise disposed of by this Act, and notwithstanding any other provision of law, shall transfer to such officer or head of agency such personnel of the International Cooperation Administration as the President determines to be necessary."

The true facts in the case are that on the date that the International Cooperation Administration was abolished on November 3, 1961, the petitioner reported for work on November 4, 1961 and gave attention to matters which were on his desk on November 3, 1961. There was no definite break in his services. He simply went to work on November 3, 1961 and reported on November 4, 1961, giving attention to the very matters that were on his desk on the date that the agency for International Cooperation Administration was abolished.

It is the contention of the petitioner that since there was no break in his services and that he worked on the same matters that were before him on November 3, 1961 under the appointment given to him, that in fact his transfer was sufficient to come within Section 621(d) of the Foreign Assistance Act of 1961. The granting of an appointment to him as a temporary employee was a mere subterfuge in an attempt to destroy his veteran's preference and his permanent civil service rights.

The petitioner was separated from his government position without regard to his rights under Section 12 or 14 of the Veteran's Preference Act (5 USC 861 and 863).

REASON FOR GRANTING THE WRIT

The petitioner asserts that this application for certiorari is made in accordance with subdivision (b) of paragraph (1) of Rule 19 of this Court in that the United States Court of Claims has decided an important question of Federal law in conflict with the applicable statutes and has so far departed from the accepted and usual course of judicial procedure as to justify and call for the exercise of this Court's power of supervision.

At the very outset the direction of the Court is called to the provisions of the Veterans Preference Act of June 27, 1944 and particularly the provisions of Section 12 of said act (5 USC 861). The Veterans Preference Act was enacted to afford protection to those employees of the United States who had served in the military or naval services during the period of war times. Said Section 12 provides, in part, as follows:

> "And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

If there had never been any provision in the Foreign Assistance Act of 1961, as fully quoted under the statement of facts, it would have been the duty of the new agency to transfer all veterans preference eligibles and career employees, such as this petitioner was, to the new agency. The question which arises in this case is whether there was, in fact, a transfer. While the record shows that the petitioner in this case was informed that he

would not be transferred to the new agency, he, in fact, was transferred to the new agency by an appointment and continued the services he previously performed in the agency which was abolished. As pointed out in the statement of facts, and which is, of course, undisputed, the petitioner worked on the same type of matter with which he was concerned on November 3, 1961 and which were on his desk on that date. The next day, on November 4, the old agency having terminated at midnight, 1961. He had the same desk and the same problems before him. The only difference was the matter of what was designated by the officials of the new agency as a temporary employee. While they told him he was not being transferred to the new agency, the true fact was that he was, in fact, so transferred and if he was, as the petitioner contends so transferred, the new agency had no right to change his status or his grade. See *Roth* v. *Brownell*, 94 U. S. App. DC 318, 215 F. 2d 500, in which it was held that the Attorney General of the United States could not change the status of an employee who had become a permanent Civil Service employee. This Court denied certiorari 348 U.S. 863. The question is whether the officials of the new Agency for International Development could by subterfuge destroy the rights of this petitioner. The petitioner certainly had a right to show the facts in his case in regard to the manner in which he was kept on as an employee of the new agency and whether or not the officials of the new agency have connived to keep him on as an employee by a cunning device to void his rights as a veterans preference eligible and a permenent Civil Service employee. It is undisputed that he was so employed, and the petitioner alleged in his petition that he, in fact, had been transfered to the new agency. He had a right to show by testimony upon his part just what occurred when the old agency was abolished and he began to work for the new agency. For the reason that I pointed out in the statement of facts there never was any break in his service whatsoever. The work he was doing

for his old agency was the same that he performed for the new agency. If the new agency did not desire to have him as an employee his services should have been terminated at midnight, November 3, 1961 when the old agency was abolished. The Court below erred in sustaining a motion for a summary judgment in favor of the Respondent. If there were facts to be determined, as appears there are in this case, then the Court should have denied the motion of the petitioner and of the Respondent for a summary judgment.

If the petitioner was, in fact, transferred to the new agency as an employee and as a veterans preference eligible, he could be removed from his position only for cause in accordance with Section 863, Title 5 of the U. S. Code. Charges had to be filed against him. This is so well known that no citation of authorities is necessary. The Veterans Preference Act of June 27, 1944, Title 5851, et seq. was sustained by this court in *Hilton* v. *Sullivan*, 334, U. S. 322, 92 L. Ed. 1416.

CONCLUSION

For the reasons herein stated the judgment of the United States Court of Claims should be reversed and this cause should be remanded to that Court with instructions to proceed in accordance with the views of this Court.

Respectfully submitted,

CLAUDE L. DAWSON
810-18th St., N. W., S. 307
Washington 6, D. C.

DONALD M. MURTHA
1009 Tower Building
Washington 5, D. C.

Attorneys for the Petitioners.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 6-63

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v.

THE UNITED STATES

ORDER

This case comes before the court on plaintiff's motion and defendant's cross-motion for summary judgment. Upon consideration thereof, together with oral argument by counsel and the briefs of the parties, and based upon the Foreign Assistance Act of 1961, 75 Stat. 445, and *Myers* v. *Hollister*, 226 F. 2d 346 (C.A. D.C. 1955), it is concluded that plaintiff is not entitled to recover, and

IT IS ORDERED that defendant's cross-motion for summary judgment be and the same is granted, plaintiff's motion for sumamry judgment is denied and plaintiff's petition is dismissed.

BY THE COURT

MARVIN JONES
Chief Judge.

(May 18, 1964)

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I, Frank T. Peartree, Clerk, United States Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above cause, of the motions by the parties for summary judgment, and of the court order granting deft's motion for summary judgment, denying plaintiff's motion and dismissing the petition.

IN TESTIMONY WHEREOF I HAVE hereunto set my hand and affixed the seal of said court at Washington City this 23rd day of July, A. D., 1964.

FRANK T. PEARTREE
Clerk, United States Court of Claims.